

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 13, 2009

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087, MC 105
Austin, Texas 78711-3087


Re: Executive Director's Exceptions to the ALJ's Proposal for Decision
Alan Black and Yolanda Black dba Black's Construction and Caliche Pit
RN104153705; TCEQ Docket No. 2008-1234-MSW-E

Dear Ms. Castañuela:

Enclosed for filing are the originals of 1) the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and 2) the Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision.

Enclosed please also find one copy of this letter to you, one copy of the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision, one copy of the Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision, and one copy of the letter to the Respondents. Please file stamp these documents and return them to Becky Combs, Attorney, Litigation Division, MC 175. If you have any questions or comments, please call me at (512) 239-6939.

Sincerely,


Becky Combs
Attorney
Litigation Division

Enclosures

cc: Mrs. Yolanda Black, P.O. Box 162, Mirando City, Texas 78369
Mr. Alan Black, P.O. Box 4, Oilton, Texas 78371
Clinton Sims, Enforcement Division, TCEQ, MC 128
Rose Luna-Pirtle, Waste Section Manager, TCEQ, MC R-16
Blas Coy, Public Interest Counsel, TCEQ, MC 103

In 2005, the Commission issued an Agreed Order regarding the alleged disposal of municipal solid waste in the caliche pit. The 2005 Agreed Order required the Respondents to remove the municipal solid waste from the pit, properly dispose of it in an authorized facility, and conduct an Affected Property Assessment Report due to the presence of lead batteries in the caliche pit.

Subsequent investigations by the Executive Director showed that significant amounts of municipal solid waste remain in the pit. On October 8, 2008 the Executive Director brought this enforcement action for the violation of the 2005 Agreed Order, for the independent violation of 30 TEX. ADMIN. CODE (TAC) § 330.15(c), and required Respondents to remove the municipal solid waste from the pit, properly dispose of it in an authorized facility, and conduct an Affected Property Assessment Report.

On May 28, 2009, the State Office of Administrative Hearings (SOAH) held a hearing on the merits in the enforcement case against the Respondents. The Executive Director alleged and proved that the Respondents violated state law regarding the disposal of municipal solid waste on their property in Webb County and that further removal of municipal solid waste was required. However, the Executive Director's witness, Arnaldo Lanese, a TCEQ investigator, testified that the batteries had been properly removed and an Affected Property Assessment Report was no longer required. Therefore, the Executive Director no longer requests an Affected Property Assessment Report as part of the requested relief.

II. PROPOSED ORDER

The Executive Director respectfully requests that the Administrative Law Judge make the following revisions to the Proposed Order:

STYLE

The Executive Director respectfully requests that the style be changed to include language ordering corrective actions by Alan Black and Yolanda Black in addition to assessing administrative penalties. Currently the style of the Order reads, "ORDER Assessing Administrative Penalties Against...". The style should be changed to read, "ORDER Assessing Administrative Penalties Against and Requiring Certain Actions of...".

REVISED FINDING OF FACT NO. 11

The Executive Director respectfully requests that Findings of Fact No. 11 be revised to delete the last four words, "and perform other corrective action".

REVISED ORDERING PROVISIONS NO. 3

The Executive Director respectfully requests that Ordering Provision No. 3.b. be deleted and the remaining subsections be re-lettered. The Executive Director also respectfully requests that in new subsection 3.b., the fourth line be changed from, "Ordering Provision Nos. 3a and 3b." to read "Ordering Provision No. 3.a."

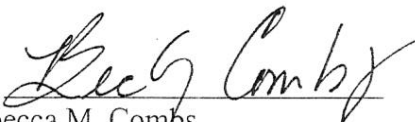
Respectfully submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Kathleen C. Decker, Division Director
Litigation Division

By: 
Rebecca M. Combs
State Bar of Texas No. 04638450
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
Telephone: (512) 239-6939
Fax: (512) 239-3434

CERTIFICATE OF SERVICE

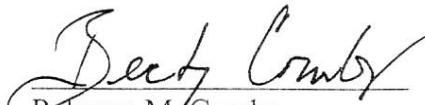
I hereby certify that on this 13th day of August, 2009, the original and seven (7) copies of the foregoing Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision ("Exceptions") was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day a true and correct copy of the foregoing Exceptions was mailed via Certified Mail, return receipt requested (**7002 2030 0005 7057 9151**), and via First Class Mail, postage prepaid, to Yolanda Black, P.O. Box 162, Mirando City, Texas 78369.

I further certify that on this day a true and correct copy of the foregoing Exceptions was mailed via Certified Mail, return receipt requested (**7009 1680 0002 2319 2534**), and via First Class Mail, postage prepaid, to Alan Black, P.O. Box 4, Oilton, Texas 78371.

I further certify that on this day a true and correct copy of the foregoing Exceptions was electronically submitted to Blas Coy, Jr., Office of the Public Interest Counsel, Texas Commission on Environmental Quality - MC 103.

I further certify that on this day a true and correct copy of the foregoing Exceptions was sent via fax to 512/475-4994 and mailed via inter agency mail, to The Honorable Kerrie Jo Qualtrough, Administrative Law Judge, State Office of Administrative Hearings, William P. Clements Building, 300 West 15th Street, Suite 502, Austin, Texas 78701



Rebecca M. Combs

Attorney

Litigation Division

Texas Commission on Environmental Quality

Buddy Garcia, *Chairman*
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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 13, 2009

Via Interagency Mail
Via Facsimile (512) 475-4994

The Honorable Kerry Jo Qualtrough
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Suite 502
Austin, Texas 78701

Re: The Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and The Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision;
Alan Black and Yolanda Black dba Black's Construction and Caliche Pit
RN104153705; SOAH Docket No. 582-09-1615; TCEQ Docket No. 2008-1234-MSW-E

To The Honorable Judge Qualtrough:

Please find enclosed a copy of 1) the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and 2) the Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision. These pleadings are being filed in response to your Proposal for Decision signed on July 24, 2009. If you have any questions or comments, please call me at (512) 239-6939.

Sincerely,

A handwritten signature in cursive script, appearing to read "Becky Combs", with a long horizontal flourish extending to the right.

Becky Combs
Attorney
Litigation Division

Enclosures

cc: Office of the Chief Clerk, MC 105
Mrs. Yolanda Black, P.O. Box 162, Mirando City, Texas 78369
Mr. Alan Black, P.O. Box 4, Oilton, Texas 78371

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**An ORDER Assessing Administrative Penalties
Against and Requiring Certain Actions of Alan
Black and Yolanda Black dba Black's
Construction and Caliche Pit; TCEQ Docket No.
2008-1234-MSW-E; SOAH Docket No. 582-09-
1615**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Alan Black and Yolanda Black d/b/a Black's Construction and Caliche Pit (the Respondents). A Proposal for Decision (PFD) was presented by Kerrie Jo Qualtrough, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the EDPRP on May 28, 2009, in Austin, Texas.

FINDINGS OF FACT

General Findings of Fact

1. The Respondents do not have a TCEQ authorization to dispose of municipal solid waste (MSW) in a caliche pit located on their respective properties in Webb County, Texas.

2. On October 8, 2008, the ED mailed the EDPRP to the Respondents. The ED alleged that the Respondents violated 30 TEX. ADMIN. CODE (TAC) § 330.15(c) and the Agreed Order Docket No. 2004-0553-MSW-E (2005 Agreed Order) by failing to prevent the unauthorized disposal of MSW; by failing to remove and dispose of all unauthorized waste at an authorized facility; and by failing to submit an Affected Property Assessment Report to the TCEQ. The ED sought an administrative penalty of \$17,550 for these violations and requested that the Respondents perform corrective action.
3. Mr. Black filed his answer to the EDPRP on October 28, 2008 and requested a hearing.
4. On December 2, 2008, the ED requested that the case be transferred to SOAH for a hearing.
5. On December 23, 2008, a notice of hearing was mailed to the Respondents stating that a preliminary hearing would be held on February 26, 2009.
6. The notice of hearing:
 - a. Indicated the time, date, place, and nature of the hearing;
 - b. Stated the legal authority and jurisdiction for the hearing;
 - c. Indicated the statutes and rules the Executive Director alleged Respondents violated;
 - d. Referred to the EDPRP, a copy of which was attached, which indicated the matters asserted by the Executive Director;
 - e. Advised Respondents, in at least twelve-point bold-faced type, that failure to appear at the preliminary hearing or the evidentiary hearing in person or by representative would result in the factual allegations contained in the notice and EDPRP being deemed as true and the relief sought in the notice possibly being granted by default; and
 - f. Included a copy of the Executive Director's penalty calculation worksheet, which showed how the penalty was calculated for the alleged violations.

7. A preliminary hearing was held on February 26, 2009.
8. On May 28, 2009, the ALJ held the hearing on the merits. The ED appeared and the Respondents appeared by phone.
9. The Commission has adopted the "Penalty Policy of the Texas Commission on Environmental Quality" (Penalty Policy) setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
10. For the two violations, the base penalty is \$1,000, multiplied by 12 quarterly events, for a total of \$12,000.
11. The Respondents have access to the caliche pit and should remove the unauthorized MSW for proper disposal.

Findings of Fact Regarding Ms. Black

12. Ms. Black owns property located off Highway 359, off J.C. Perez Road, Oilton, Webb County, Texas. A caliche pit is located on this property. Ms. Black allowed the disposal of MSW in the caliche pit. Specifically, Ms. Black allowed the disposal of construction and demolition waste, rubbish, and other MSW in the caliche pit.
13. On March 1, 2005, Ms. Black entered into the 2005 Agreed Order. The 2005 Agreed Order was effective on May 23, 2005.
14. On September 20, 2005, 120 days after the effective date of the order, Ms. Black failed to comply with the 2005 Agreed Order. Ms. Black did not comply with Provision No. 2(b) requiring her to dispose of all the unauthorized waste at an approved facility. Ms. Black did not comply with Provision No. 2(c)(i) requiring her to submit certification of

compliance with Provision No. 2(b). Ms. Black did not comply with Provision 2(c)(ii) requiring her to submit an Affected Property Assessment Report.

15. On May 2, 2006, a notice of violation (NOV) was issued for Ms. Black's noncompliance with the 2005 Agreed Order.
16. Ms. Black has the ability to pay an administrative penalty of no more than \$3,600.

Findings of Fact Regarding Mr. Black

17. Mr. Black owns property located off Highway 359, off J.C. Perez Road, Oilton, Webb County, Texas. A caliche pit is located on this property. Mr. Black disposed of MSW in the caliche pit. Specifically, Mr. Black allowed and continued to allow the disposal of construction and demolition waste, rubbish, and other MSW generated by his construction company.
18. Mr. Black failed to provide potentially relevant financial information regarding his claim of inability to pay the administrative penalty. The proper penalty for Mr. Black is \$8,400.

CONCLUSIONS OF LAW

1. Under TEX. WATER CODE ANN. (Texas Water Code) § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.

2. Under Texas Water Code § 7.052(c), a penalty for the violations alleged in this case may not exceed \$10,000 per violation, per day.
3. Under Texas Water Code § 7.073, the Commission may order the violator to take corrective action.
4. As required by Texas Water Code § 7.055 and 30 TAC §§ 1.11 and 70.104, the Respondents were notified of the EDPRP and of the opportunity to request a hearing on the alleged violations or the penalties or corrective actions proposed therein.
5. As required by TEX. GOV'T CODE ANN. (Texas Government Code) §§ 2001.051 and 2001.052; Texas Water Code § 7.058; 1 TAC § 155.401, and 30 TAC §§ 1.11, 1.12, 39.425, 70.104, and 80.6(b)(3), Respondents were notified of the hearing on the alleged violations and the proposed penalties.
6. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to Texas Government Code, chapter 2003.
7. Section 330.15(c) of 30 TAC provides that “[e]xcept as otherwise authorized by this chapter, a person may not cause, suffer, allow, or permit the dumping or disposal of MSW without the written authorization of the commission.”
8. The Commission defines “municipal solid waste” as “[s]olid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial solid waste.” 30 TAC § 330.3(88).

9. The Commission defines “construction and demolition waste” as “[w]aste resulting from construction or demolition projects; includes all materials that are directly or indirectly the by-products of construction work or that result from demolition of buildings and other structures, including, but not limited to, paper, cartons, gypsum board, wood, excelsior, rubber, and plastics. 30 TAC § 330.3(33).
10. The Commission defines “rubbish” as “[n]onputrescible solid waste (excluding ashes), consisting of both combustible and noncombustible waste materials. Combustible rubbish includes paper, rags, cartons, wood, excelsior, furniture, rubber, plastics, brush, or similar materials; noncombustible rubbish includes glass, crockery, tin cans, aluminum cans, and similar materials that will not burn at ordinary incinerator temperatures (1,600 degrees Fahrenheit to 1,800 degrees Fahrenheit).” 30 TAC § 330.3(130).
11. Based on the above Findings of Fact and Conclusions of Law, the Respondents violated 30 TAC § 330.15(c).
12. Based on the above Findings of Fact and Conclusions of Law, Ms. Black violated the 2005 Agreed Order.
13. In determining the amount of an administrative penalty, section 7.053 of the Texas Water Code requires the Commission to consider several factors including:
 - (1) the nature, circumstances, extent, duration, and gravity of the prohibited act, with special emphasis on the impairment of existing water rights or the hazard or potential hazard created to the health or safety of the public;
 - (2) the impact of the violation on:
 - (A) air quality in the region;
 - (B) a receiving stream or underground water reservoir;
 - (C) instream uses, water quality, aquatic and wildlife habitat, or beneficial freshwater inflows to bays and estuaries; or
 - (D) affected persons;

- (3) with respect to the alleged violator:
 - (A) the history and extent of previous violations;
 - (B) the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
 - (C) the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
 - (D) economic benefit gained through the violation; and
 - (E) the amount necessary to deter future violations; and

- (4) any other matters that justice may require.

14. The TCEQ's 2002 Penalty Policy implements these statutory factors.

15. Based on the above Findings of Fact, Conclusions of Law, and the 2002 Penalty Policy, the Respondents should be assessed an administrative penalty of \$12,000.

16. Section 70.8, title 30 of the Texas Administrative Code provides:

- (a) If any respondent, in response to a contested enforcement case, asserts an inability to pay the penalty recommended in that pleading, or challenges the executive director's recommendation regarding the amount of penalty that is necessary to deter future violations, that party shall have the burden of establishing that a lesser penalty is justified under that party's financial circumstances.
- (b) A party asserting a claim under this section must produce all financial records that would be potentially relevant to that issue within 30 days of raising that claim, but no later than 30 days before the specified date for hearing without leave from the judge. The executive director is not required to make a discovery request for such financial records. The failure of the party raising such a claim to provide all potentially relevant financial records within the time discussed in this subsection shall constitute a waiver of the claim.

17. Based on the above Findings of Fact and Conclusions of Law, Ms. Black does not have an ability to pay an administrative penalty of more than \$3,600.

18. Based on the above Findings of Fact and Conclusions of Law, Ms. Black should be assessed an administrative penalty of \$3,600.
19. Based on the above Findings of Fact and Conclusions of Law, Mr. Black waived his claim regarding inability to pay and should be assessed the remainder of the administrative penalty, for a total of \$8,400.
20. Based on the above Findings of Fact and Conclusions of Law, the Respondents should be required to perform the corrective action as set out in the Ordering Provisions, below.

III. ORDERING PROVISIONS

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Within 30 days after the effective date of this Commission Order, Alan Black shall pay an administrative penalty in the amount of \$8,400 for the violation of 30 TAC § 330.15(c). The payment of this administrative penalty and performing the corrective actions set out below will completely resolve the violations set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. Checks rendered to pay penalties imposed by this Order shall be made out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: Alan Black, TCEQ Docket No.2008-1234-MSW-E" to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

2. Within 30 days after the effective date of this Commission Order, Yolanda Black shall pay an administrative penalty in the amount of \$3,600 for the violation of 30 TAC § 330.15(c) and TCEQ Agreed Order Docket No. 2004-0553-MSW-E. The payment of this administrative penalty and performing the corrective actions set out below will completely resolve the violations set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. Checks rendered to pay penalties imposed by this Order shall be made out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: Yolanda Black, TCEQ Docket No.2008-1234-MSW-E" to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

3. The Respondents shall implement the following corrective measures:
 - a. Within 30 days after the effective date of this Order, remove all municipal solid waste and dispose of the wastes at an authorized facility.
 - b. Within 75 days after the effective date of the Commission Order, submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provision No. 3.a.

The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

“I certify under penalty of law that I have personally examined and am familiar with all the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

The certification shall be submitted to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

with a copy to:

Rose Luna-Pirtle, Waste Section Manager
Laredo Regional Office
Texas Commission on Environmental Quality
707 East Calton Road, Suite 304
Laredo, Texas 78041-3887

4. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to the Respondents if the Executive Director determines that the Respondents have not complied with one or more of the terms or conditions in this Commission Order.
5. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
6. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Texas Government Code § 2001.144.

7. As required by Texas Water Code § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to the Respondents.
8. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Buddy Garcia, Chairman
For the Commission